Nos. 18-17308, 18-17311

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Appellee,

v.

WILLIAM P. BARR, et al.,

Defendants-Appellants.

STATE OF CALIFORNIA,

Plaintiff-Appellee,

v.

WILLIAM P. BARR, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION ET AL. AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae the National Immigrant Justice Center states that its parent organization is the Heartland Alliance. The remaining amici curiae do not have parent corporations.

No publicly held corporation owns 10 percent or more of any stake or stock in any of the amici curiae.

/s/ Spencer E. Amdur
Spencer E. Amdur
May 29, 2019

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INTEREST OF AMICI CURIAE

Amici are non-profit civil rights organizations that serve immigrant communities in California and across the country. *See* Addendum (list of amici).[1] Since early 2017, these communities have been the target of a relentless campaign by the Executive Branch to force state and local police to help detain and deport immigrants. Each time an aspect of this campaign has been enjoined by a court—and almost all of them have been enjoined—the Department of Justice has devised a new strategy to achieve the same coercive effect.

Amici write to address the Department's claims of statutory authority in this case. The Department's sweeping arguments in support of that authority, if accepted, would dramatically undermine local communities' ability to supervise their own police forces. Amici urge the Court to enjoin the challenged conditions and safeguard "[p]erhaps the principal benefit of the federalist system," which is "to ensure the protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (quotation marks omitted).

[1] All of the parties have consented in writing to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned counsel certifies that counsel for amici authored this brief in whole, and that no person other than amici curiae contributed money to preparing or submitting this brief.

INTRODUCTION

The Department of Justice has claimed a startling new power to control state and local police by attaching new conditions to federal funds through the Byrne Justice Assistance Grant ("JAG") program. It maintains that Congress has delegated near-unlimited power to leverage JAG funds to force police to adopt law enforcement policies of the Department's choosing. But none of the statutes it invokes has ever been understood to authorize the Department to impose new substantive requirements unrelated to the use of JAG funds. Amici agree with the Plaintiffs that these statutes do not provide the authority the Department claims.

Amici submit this brief to further explain why these statutes cannot be read to authorize the notice, access, or compliance conditions.

First, the challenged conditions do not qualify as "special conditions" under § 10102(a)(6). That phrase is a narrow term of art, which refers to conditions that ensure grantees comply with existing obligations. And when Congress uses a term of art in a statute, it incorporates the term's established legal meaning. Thus, even if § 10102(a)(6) provided authority to impose special conditions—which it does not, *see* SF Br. 19-22; Cal. Br. 30-32—that provision still would not allow the Department to create the conditions it has imposed here.

Second, 8 U.S.C. § 1373 is not an "applicable Federal law" for purposes of the JAG program. 34 U.S.C. § 10153(a)(5)(D). The word "applicable," as used in

the JAG statute, refers only to laws that are applicable to federal grants, not the entire universe of laws that are applicable to States and localities outside the grant context. *City of Philadelphia v. Att'y Gen.*, 916 F.3d 276, 288-91 (3d Cir. 2019); *San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953-55 (N.D. Cal. Oct. 5, 2018).

Third, the Department claims authority based on three provisions it did not invoke in earlier rounds of JAG litigation. But each of them pertains only to how JAG funds are spent and accounted for. *See* 34 U.S.C. § 10102(a)(6) (describing "priority purposes" for the use of JAG funds); 34 U.S.C. § 10153(a)(4) (recordkeeping requirements for JAG-funded programs); *id.* § 10153(a)(5)(C) (requiring "coordination" with state and local agencies affected by the grant before applying for JAG funds). None of them provides authority to impose substantive requirements unrelated to the administration of JAG funds. *Philadelphia*, 916 F.3d at 285.

The Department's claims of statutory authority in this case are unprecedented. In the decades it has administered JAG and its predecessors, the Department has never claimed any ability to wield those funds to extract policy concessions unconnected to the expenditure of federal funds. When an agency claims to discover "an unheralded power" lying dormant "in a long-extant statute," courts "typically greet its announcement with a measure of skepticism." *Util. Air Reg. Group v. EPA*,

134 S. Ct. 2427, 2444 (2014). The Court should reject the Department's expansive new statutory claims.

ARGUMENT

I. The New Conditions Are Not Valid "Special Conditions."

Multiple courts have noted that the term "special conditions" is "most likely a term of art for the additional conditions placed on high-risk grantees," which would exclude the notice, access, and compliance conditions. *San Francisco v. Sessions*, 349 F. Supp. 3d 924, n.2 (N.D. Cal. 2018) (quotation marks omitted); *City of Chicago v. Sessions*, 888 F.3d 272, 285 n.2 (7th Cir. 2017), *partially vacated on other grounds*, 2018 WL 4268817 (7th Cir. June 4, 2018) (en banc); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 617 (E.D. Pa. 2017) (holding that "special conditions" is a "term of art"); *New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 229 n.9 (S.D.N.Y. 2018) (reserving this question).

For completeness and to facilitate whatever further review the Department may seek, amici respectfully urge the Court to address this alternative ground and decide the meaning of "special conditions" in this appeal. It presents a pure legal issue, and a straightforward one at that, because the Department has not offered any meaningful response in multiple rounds of briefing on this issue. *See infra* Part I.B. At the same time, the Department has shown that it will continue enforcing these new conditions, against whoever it can, as long as any uncertainty remains about

their legality. *See* Cal. Br. 56; Order, *Los Angeles v. Sessions*, No. 18-7347, Dkt. 62, at 4-5 (C.D. Cal. Feb. 15, 2019) (describing the Department's persistence); *San Francisco v. Sessions*, 2019 WL 1024404, at *5 (N.D. Cal. Mar. 4, 2019) (same). A ruling on the meaning of "special conditions" would facilitate much-needed closure on these issues.

A. The Phrase "Special Conditions" Is a Narrow Term of Art that Excludes the Immigration Conditions.

When Congress uses a term of art, courts must assume that "Congress intended it to have its established meaning." *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 342 (1991). A term of art is a phrase that has "accumulated [a] settled meaning" in the law, and courts must apply that meaning "unless Congress has unequivocally expressed an intent to the contrary." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981). In determining whether a phrase is a term of art, courts look to a variety of evidence, including treatises, expert opinion, regulations, and statutes. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 467-68 (2002); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575-76 (1995).

The evidence here is overwhelming. For at least three decades, every relevant authority has used "special conditions" to mean conditions that ensure compliance with *existing* grant requirements. The Department has identified no persuasive evidence that the phrase means anything beyond that.

Both of the leading treatises on federal grant law define special conditions as those intended to ensure that a grantee complies with existing rules. One treatise defines "special conditions" as conditions imposed on a "'high risk' recipient" to ensure that the recipient "will successfully execute [the] grant." Allen, Federal Grant Practice (2017 ed.), § 25:4; *see also id.* §§ 25:1 (defining "'specific' or 'special' conditions"), 25:2, 25:5, 25:10, 47:6. The other treatise contrasts "special conditions"—which address "special risks" of non-compliance—with "general conditions" and "cross-cutting conditions," both of which involve substantive rules applicable to all grantees. *Compare* Dembling & Mason, Essentials of Grant Law Practice (1991), at 125-36 (special conditions), *with id.* at 121-24 (general conditions); *id.* at 107-19 (cross-cutting conditions).

That understanding is shared by the federal agencies that administer grants. Most importantly, the White House's Office of Management and Budget (OMB) has long defined "special conditions" as conditions that are imposed on "'high risk' applicants/grantees." OMB, Circular A-102, § 1(g) (Aug. 29, 1997).[2] This definition dates back to at least the 1980s, long before the "special conditions" language was enacted in 2006. *See* OMB, *Uniform Administrative Requirements for Grants*, 53 Fed. Reg. 8034-01, 8037, 8068, 8090 (1988). As the agency that sets

[2] Available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A102/a102.pdf.

grant policies across the Executive Branch, OMB's usage is especially relevant. *See* 2 C.F.R. Part 200 (OMB's general grant policies); *Mideast Systems v. Hodel*, 792 F.2d 1172, 1175 (D.C. Cir. 1986) (noting OMB's role in administering federal grant law). Its current government-wide grant regulations reflect the same understanding: They use the phrase "special conditions" to mean conditions that "mitigate the effects of a non-Federal entity's risk" of non-compliance with existing grant requirements. 2 C.F.R. § 200.205(a)(2), (b). And they restrict the use of "specific conditions" to situations where a grantee poses a "risk" of non-compliance or "has a history of failure." *Id.* § 200.207(a).[3]

Other grant-making agencies use the term the exact same way. *See, e.g.*, 7 C.F.R. § 550.10 (Department of Agriculture); 34 C.F.R § 80.12 (Department of Education); 45 C.F.R. § 74.14 (Department of Health and Human Services). No mention of "special conditions" in the Code of Federal Regulations deviates from this definition.

[3] The terms "special conditions" and "specific conditions" are used interchangeably. *See, e.g.*, OMB, *Federal Awarding Agency Regulatory Implementation of OMB's Uniform Administration Requirements*, 79 Fed. Reg. 75871-01, 75874 (Dec. 19, 2014) (explaining that prior "standards for imposing special conditions" are "virtually identical" to current standards for imposing "specific conditions" pursuant to 2 C.F.R. §§ 200.205 and 200.207); Allen, Federal Grant Practice (2017 ed.), § 25:1 (stating that "'specific' or 'special' conditions" are the same); OMB, Uniform Guidance Crosswalk from Existing Guidance to Final Guidance, at 3, 4 (2013) (noting OMB's transition between the two phrases).

The Department's own regulations are no exception. When Congress enacted the current version of § 10102(a)(6) in 2006, the Department's regulations governing "[s]pecial grant or subgrant conditions" described them as intended for "'high-risk' grantees" who might have problems adhering to existing grant requirements. 28 C.F.R. § 66.12(a) (in effect from Mar. 11, 1988 until Dec. 25, 2014). And when the Department rescinded that regulation, it adopted OMB's special-conditions regulations, which, as explained above, use the phrase as a term of art. *See* 2 C.F.R. § 2800.101 (adopting, inter alia, 2 C.F.R. §§ 200.205, 200.207).

Congress's own usage reflects the same understanding. For instance, in a statute enacted in 2004, just two years before § 10102(a)(6), Congress used the phrase in the context of a "high-risk grantee." *See* 20 U.S.C. § 1416(e)(1)(C). That makes sense in light of agencies' and experts' consistent usage in the decades prior. Congress has never used the phrase to mean anything beyond its term-of-art meaning.

Against this consistent usage by grant-law experts, commentators, the White House, federal agencies, and Congress, the Department has not identified *any* published or enacted authorities that define special conditions to mean something broader than compliance-ensuring rules. That is striking, because the Department has now had multiple opportunities to brief this issue across five different JAG cases. It has vaguely suggested that there could be other "type[s] of special conditions."

U.S. Br. 26. But it has not offered any evidence or explanation to support that bare assertion.

To the extent the Department believes that *every* condition can be a special condition, that view not only conflicts with the term-of-art definition, it is also foreclosed by the rule against superfluity. Reading § 10102(a)(6) to authorize *all* conditions would cut the word "special" out of the statute. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) ("[E]ach word Congress uses is there for a reason."). Indeed, the Department has never explained—in this or any other JAG case—what it thinks "special conditions" actually means. It cannot just mean "conditions."

If any doubt remained, federalism canons would resolve it. The Supreme Court has instructed courts to "assume that Congress does not casually authorize administrative agencies to interpret a statute" in a way that "permit[s] federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001); *see Bond v. United States*, 572 U.S. 844, 858 (2014) (applying clear-statement canon to federal policies that affect state criminal justice programs). The Department would therefore need to identify an "unmistakably clear" statutory statement that "special conditions" in § 10102(a)(6) has the limitless meaning it claims. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The Department plainly cannot meet that high burden.

B. None of the Department's Responses Are Persuasive.

The Department has not offered a meaningful response to the term-of-art evidence in this or any other JAG case. Its arguments are all easily rejected.

First, the Department has argued that "special conditions" in § 10102(a)(6) should not be read as a term of art because the statute "contains no language referencing [or] incorporating" the specialized meaning. U.S. Reply Br. at 6, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. filed Jan. 10, 2018). But that gets the term-of-art canon exactly backwards. The whole point is that, in the absence of an explicit statutory definition, "we must *presume* that Congress intend[s] to incorporate" the established meaning. *Neder v. United States*, 527 U.S. 1, 23 (1999) (emphasis in original). If an "explicit reference" to the established meaning was required, the canon would do no interpretive work. *Id.* (rejecting identical argument); *see Field v. Mans*, 516 U.S. 59, 69 (1995) (same).

Second, and relatedly, the Department has argued that when Congress enacted § 10102(a)(6), it did not incorporate the Department's special-conditions regulation at the time, 28 C.F.R. § 66.12. *See* U.S. Br. 26. But the point is not that Congress incorporated any one regulation. Rather, it used an established term of art, whose meaning is *reflected* in that regulation, along with other agencies' regulations, OMB's guidance, statutory usage, and leading grant-law treatises. The Department

makes no attempt to grapple with these many indications that "special conditions" is, and has long been, a term of art.

Third, the Department has argued that § 10102(a)(6)'s legislative history contains "broad language." U.S. Reply Br. at 6, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. filed Jan. 10, 2018). But the language it cites is simply a quote of the statute's text with no further explanation. *See id.* (quoting H.R. Rep. No. 109-223, at 101 (2005)). That language is no more "broad" than the statute, and does not support deviating from the term's established meaning.

Fourth, the Department claims that, in the last decade, it has placed conditions on JAG grants that were not connected to existing statutes and regulations. U.S. Br. 21. That is wrong: The previous JAG conditions have all either been authorized by a specific statute or been tied to pre-existing grant requirements. *See infra* Part I.C (addressing each condition the Department has invoked); *Philadelphia*, 916 F.3d at 290 n.12.

But even if the Department *had* imposed such conditions, their mere existence would not prove their legality. There is no rule that "insulates disregard of statutory text from judicial review" simply because an agency has exceeded its authority in the past. *Rapanos v. United States*, 547 U.S. 715, 752 (2006). The Court should reject the Department's "curious appeal to entrenched executive error." *Id.*; *SEC v.*

Sloan, 436 U.S. 103, 117-19 (1978); *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014) (a "few scattered . . . anomalies" are not probative of legality).

To the extent the Department has recently described its general conditions as "special conditions" in unpublished letters to grant recipients, *but see* Dembling & Mason at 121-36 (explaining the difference between general and special conditions), its recent misuse of that phrase does not somehow mean that the phrase is no longer a term of art. Decades of consistent usage in every published and enacted authority prove otherwise. Nor can the Department's later conditions have any bearing on what Congress meant when it enacted the statute in 2006. Indeed, the presumption that Congress incorporates a term-of-art meaning can only be rebutted when "*Congress* has unequivocally expressed an intent to the contrary." *Amax Coal*, 453 U.S. at 330 (emphasis added). In other words, the "rebuttal can only come from the [] statutes themselves," not from some later, informal, administrative deviation. *Neder*, 527 U.S. at 23 n.7. Nothing in the statute remotely suggests—much less unequivocally demonstrates—an intent to diverge from the settled and well-understood meaning of "special conditions." That meaning therefore controls, and it does not include the Department's immigration conditions.

C. No Other JAG Conditions Depend on the Unlimited Conditioning Power the Department Claims Here.

The challenged conditions are unlike any of the other conditions the Department has previously imposed. None of the other conditions rely on the

Department having unlimited power to impose new policy requirements unconnected to the use of JAG funds. Each one either implements an existing statutory condition or is authorized by a specific statute outside § 10102(a)(6). And each of them narrowly governs how grantees administer their JAG grants—how they use the funds, report on JAG-funded efforts, and adhere to program requirements. The Department's new immigration conditions stand alone in their attempt to leverage JAG funds to extract unrelated policy concessions. Striking them down will not invalidate any other requirements.

Consider the conditions from the 2016 grant cycle the Department believes are most similar to the new immigration conditions. *See* U.S. Br. 9, 16, 21. Every single one of them is tied to a specific statute outside § 10102(a)(6), and thus does not depend on "special conditions" having an unlimited meaning.

- The Department's "protections for human research subjects" (U.S. Br. 21, citing ER 411 ¶ 29) simply incorporate the government's regulations on that topic, 28 C.F.R. Part 46, which were promulgated pursuant to a statute that *expressly* contemplates agency "rules, policies, guidelines, and regulations" for the protection of human research subjects, 42 U.S.C. § 300v-1(b)-(c).
- The conditions that restrict certain purchases implement the JAG statute's own list of "prohibited uses," 34 U.S.C. § 10152(d) (ER 413-14 ¶¶ 45, 47, 48,

49, 50),[4] along with statutorily-authorized controls on military equipment, *see* Exec. Order No. 13688 (Jan. 16, 2015) (ER 414 ¶ 46); 22 U.S.C. § 2778 (giving the President authority to control transfers of military equipment).

- The body armor conditions mirror the same conditions imposed by a statute, 34 U.S.C. § 10202(c), which requires grantees to comply with "any performance standards established by the [Department]," *id.* § 10202(c)(1)(C).[5]
- The "information technology requirements" (U.S. Br. 21) flow directly from the JAG statute's requirements that grantees provide a variety of reports, evaluations, data, and other information about programs funded by JAG grants, all in a "form" chosen by the Department. 34 U.S.C. §§ 10203(a), 10153(a)(4), 10152(c); *see also id.* § 10107(b)(1) (directing Department to "establish clear minimum standards for computer systems" of grantees).

[4] In fact, the Department's list of restricted purchases parrots the statute almost verbatim. *See* http://bit.ly/2W33gQa.

[5] The Department imposed the body armor conditions before they were codified in statute, but at the time, other authorities supported those conditions. *See, e.g.*, 34 U.S.C. §§ 10221(a)-(b), 10152(c)(1) (directing the Department to promote compliance with National Institute of Justice standards); 41 U.S.C. § 8302(a)(1) (the Buy American Act, which directs agencies to ensure that public funds are spent on American-made goods); Exec. Order No. 13788, § 2(a) (Apr. 18, 2017) (similar). And at any rate, as explained above, scattered deviations here and there do not somehow establish that the Department's authority must be unlimited, or that "special conditions" is not a term of art. *Rapanos*, 547 U.S. at 752; *Sloan*, 436 U.S. at 117-19.

- The "training requirements" (U.S. Br. 21) flow from statutes directing the Department to provide "training" and "assistance" to grantees, *e.g.*, 34 U.S.C. § 10153(b)(1)-(2), and to ensure that grantees adhere to the terms of the JAG program, *e.g.*, *id.* §§ 10109(a)(2), (c)-(d), 10153(a)(5)(A), (D).[6]

In addition to their statutory basis outside § 10102(a)(6), these previous conditions are also substantively tied to the JAG program in a way that the immigration conditions are not. They all regulate how grantees administer their JAG funds, to ensure that they comply with existing requirements and spend their awards in ways that further JAG's purposes. *See*, *e.g.*, 34 U.S.C. § 10152(a) (listing program purposes); ER 414 ¶ 47 (restricting purchases "with award funds"); *id.* ¶¶ 45, 46, 49, 50 (same); ER 413 ¶¶ 38-39 (body armor purchased "with JAG funds"). They are thus different in kind from the immigration conditions, which have nothing to do with grant administration, and exist only to force JAG recipients to help with

[6] At the oral argument before this Court in *City of Los Angeles v. Barr*, No. 18-56292 (9th Cir. *argued* Apr. 10, 2019), the Department invoked several additional conditions from the 2017 grant cycle, but these too flow from statutes outside § 10102(a)(6) and simply ensure that grant funds are used properly. *See* Oral Arg. Rec. at 1:22-2:20, http://bit.ly/2VSIuih; Excerpts of Record, *Los Angeles*, No. 18-56292, at 12 ¶ 13 ("guiding principles" for training materials that a grantee "develops or delivers with OJP award funds"); *id.* at 17 ¶¶ 28, 29 (same IT requirements addressed above); *id.* at 18 ¶¶ 34, 35 (same training requirements addressed above); *id.* at 20 ¶ 44 (requiring grantees to submit "accountability metrics" about the training they provide); *id.* at 27 ¶ 57 (DNA testing for which "award funds are used"); *see also* 34 U.S.C. § 40701(c)(1), (a)(1) (directing the Department to "establish appropriate grant conditions" for federally-funded DNA testing to "maximize[] the effective utilization of DNA technology"); *id.* § 40728(a)(1) (directing the Department to "establish best practices for [DNA] evidence retention").

separate enforcement activities. The Department has never previously tried to impose that kind of condition.

II. Section 1373 Is Not an "Applicable Federal Law" for JAG Purposes.

The Department also claims to have discovered a second sweeping power to invent new grant conditions in 8 U.S.C. § 10153(a)(5)(D). In imposing the compliance condition, it claims it can now condition JAG funds on statutes like § 1373 that have nothing to do with federal grants, and then force applicants to comply with *any* interpretation it announces, no matter how tenuous. U.S. Br. 28-29. There are hundreds (if not thousands) of statutes and regulations that could be deployed for this purpose, and the Department has already invoked at least eight. *See* JAG Solicitation, FY 2018, at 36-37, 44-45 (imposing brand new interpretations of 8 U.S.C. §§ 1226(c), 1226(a), 1231(a)(4), 1324(a), 1357(a), 1366(1), 1366(3)).[7]

The Department's position is wrong, as multiple courts have now concluded. *See City of Philadelphia v. Att'y Gen.*, 916 F.3d 276, 288-91 (3d Cir. 2019); *New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 229-31 (S.D.N.Y. 2018); *San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953-55 (N.D. Cal. 2018). The JAG statute requires applicants to certify compliance with laws that are "applicable," but it is silent about whether that means laws applicable to the *grant*, or the much larger universe of laws applicable to the *applicant*. While the phrase in isolation does not

[7] *Available at* https://www.bja.gov/funding/JAGLocal18.pdf.

specify the object of "applicable," every facet of the surrounding context requires the narrower meaning. First, every adjacent grant condition pertains narrowly to JAG funds, *see* 34 U.S.C. § 10153(a)(1)-(5); Congress would not bury a sweepingly broad set of conditions as the last element in a list of narrow, grant-focused application requirements. Second, the Department's limitless interpretation would render the word "applicable" superfluous, because it would make the condition reach *all* federal laws. Third, the Supreme Court has instructed courts to choose the narrower interpretation of grant conditions and statutes that intrude on state autonomy, especially statutes that interfere with States' criminal justice activities.

The Department's view would make the JAG statute an extreme outlier in the U.S. Code: Amici are not aware of any federal grant that is conditioned on compliance with every conceivable law that applies to States, localities, and their employees, nor has the Department identified any in multiple rounds of litigation. The Court should reject its claim.

A. The Text and Structure of 34 U.S.C. § 10153(a) Foreclose the Department's Position.

The provision on which the Department bases its claim of authority appears in the JAG statute's application requirements. *See* 34 U.S.C. § 10153(a). It provides that JAG applicants must certify compliance both with "all provisions of this part"

and with "all other applicable Federal laws." *Id.* § 10153(a)(5)(D).[8] The phrase "applicable Federal laws" could mean two different things: It could mean laws applicable to the *grant*—i.e. conditions that are already attached to JAG funds specifically or federal funds generally.[9] Or it could mean the hundreds of laws that are applicable to *applicants*—i.e. every statute and regulation that applies to States, localities, and their employees, most of which (like § 1373) have no connection to federal funds. By itself, the text "all other applicable Federal laws" does not say whether "applicable" refers to grants or applicants.

The Department is therefore wrong that the narrower possibility is an artificially cabined interpretation. U.S. Br. 29. In fact, its own certification form uses virtually the same phrase—"all applicable federal statutes and regulations"—interchangeably with the phrase "all federal statutes and regulations *applicable to the award*." *See* Dep't of Justice, Certified Standard Assurances, OMB No. 1121-0140 (emphasis added); *compare id.* § 3(b), *with id.* § 3(a).[10] That usage does not

[8] "This part" refers to the JAG statute, which is contained in Part A of Title 34, Chapter 101, Subchapter V.

[9] Some such conditions apply specifically to JAG funds. *See, e.g.*, 34 U.S.C. § 20927(a). Others apply to all DOJ funds, *see, e.g.*, 34 U.S.C. § 30307(e), or to federal funds more generally, *see, e.g.*, 42 U.S.C. § 2000d (no discrimination in "any program or activity receiving Federal financial assistance"); 29 U.S.C. § 794(a) (same); 42 U.S.C. § 4604(c) (similar).

[10] "(3) I assure that, through the period of performance for the award (if any) made by OJP based on the application—(a) the Applicant will comply with all award requirements and all federal statutes and regulations applicable to the award; (b) the Applicant will require all subrecipients to comply with all applicable award

require any artificial limiting construction. To be sure, Congress sometimes identifies the object of "applicable" explicitly. *See, e.g.*, 40 U.S.C. § 1314(c) ("laws applicable to the State"); 42 U.S.C. § 16154(g)(1) ("applicable Federal laws . . . governing awards"); 43 U.S.C. § 2631 ("all laws, rules, and regulations applicable to the national forests"). But where it does not, the phrase "applicable laws" alone does not answer the question.[11]

The surrounding context, however, provides a clear answer. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008) ("[T]he term 'applicable' must be examined in context."); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1133 (9th Cir. 2009) (rejecting an "expansive definition" of "the term 'applicable'"). Numerous aspects of § 10153's text establish that "applicable" means applicable to the grant, not the applicant.

First, the applicable-laws provision must be read consistently with the many surrounding conditions listed in § 10153(a). *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("[A] word is known by the company it keeps."). Without exception, all the other conditions in § 10153(a) apply narrowly to the grant itself.[12]

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requirements and all applicable federal statutes and regulations." *Id.*, *available at* https://bit.ly/2Cu2WAK (emphases added).

[11] Tellingly, the only case the Department cites for its textual argument involved a statutory phrase *without* the word "applicable." *See* U.S. Br. 29; *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) ("all other law").

[12] *See, e.g.*, 34 U.S.C. § 10153(a)(1) (JAG funds cannot be used to supplant state or local funds); *id.* § 10153(a)(2), (3) (JAG project must be submitted for appropriate

None of them imposes conditions outside the context of grant administration. If "applicable" meant what the Department believes, § 10153(a)(5)(D) would be a major outlier in the JAG statute—it would be the only provision to import requirements (hundreds, in fact) that do not by their terms apply to federal funds. Courts typically do not interpret serial provisions like § 10153(a) to include such a glaring difference in kind. *See Kucana v. Holder*, 558 U.S. 233, 246 (2010) (comparing adjacent provisions).

Second, the phrase "all other" makes the applicable-laws provision a "residual clause," which is limited by "the enumerated categories . . . which are recited just before it." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Section 10153(a)(5)(D) first asks applicants to certify that they comply with "all provisions of" the JAG statute. Those requirements are already tied to federal funds, with or without the certification in § 10153(a)(5)(D). Accordingly, the statute's residual clause—"all *other* applicable Federal laws"—necessarily refers to laws that likewise are already tied to federal funds. Otherwise, "there would have been no need for Congress to" enumerate compliance with the JAG statute if it was "subsumed within" an unlimited residual clause. *Id.* at 114-15.[13]

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review); *id.* § 10153(a)(4) (requirement to report on administration of JAG grant); *id.* § 10153(a)(6) (plan for how JAG funds will be used).

[13] The Department has elsewhere cited *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008), which concluded that for one specific statute, the residual clause canon was not "useful" because the statute's "textual and structural evidence" all pointed

This context renders the Department's position untenable. Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *Every single one* of § 10153(a)'s nine other conditions is closely tied to grant administration, including the four other certifications in subsection (a)(5). It would be a striking departure for the second half of the final term in that list to suddenly impose a limitless swath of conditions, which, unlike everything else in § 10153(a), are unconnected to JAG funds specifically or federal funds generally. Congress does not "hide elephants in mouseholes." *Id*.

Third, even viewing the phrase in isolation, the rule against superfluity forecloses the Department's attempt to make "applicable Federal laws" mean *all* federal laws. That would render "applicable" meaningless. *See United States v. Hayes*, 555 U.S. 415, 425-26 (2009) (rejecting an interpretation that rendered a single word inoperative). The Department has no coherent answer to this problem. Its only response, both below and in other cases, has been that, without the word "applicable," the statute might have somehow required state and local grantees to

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the other way, and because the terms preceding the residual clause had "no relevant common attribute." *Id.* at 223, 225. But outside those circumstances, courts regularly apply the canon to avoid an "essentially unlimited" reading of a residual clause. *Falkenberg v. Alere Home Monitoring, Inc.*, 2014 WL 5020431, at *3 (N.D. Cal. Oct. 7, 2014) (distinguishing *Ali*). Here, unlike in *Ali*, all of the textual and structural evidence *aligns* with the narrower view, and all of the preceding terms in § 10153(a) and subsection (a)(5) have a common attribute: They all pertain specifically to grant administration.

comply with federal laws that, by their terms, only apply to private individuals, like personal income taxes or selective service registration. *See* 26 U.S.C. § 1; 5 U.S.C. § 3328. But a requirement to follow "all other federal laws" would not have subjected grantees to laws that are *incapable* of applying to grantees. The Department's strained attempt to avoid superfluity underscores that, of § 10153(a)(5)(D)'s two possible constructions, only the narrow one gives independent meaning to each word.

In line with its text, Congress has consistently understood § 10153(a)(5)(D) not to impose conditions unrelated to federal funds. In the two decades since it enacted § 1373, "Congress has repeatedly, and frequently," considered making § 1373 a condition of receiving JAG funds, but has "declined" each time. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 531 (N.D. Cal. 2017) (collecting bills). These amendments would have been wholly unnecessary if § 10153(a)(5)(D) *already* required compliance with § 1373 as a condition of JAG funds. *See Trump v. San Francisco*, 897 F.3d 1225, 1234 (9th Cir. 2018) (President could not impose spending condition that "Congress has frequently considered and thus far rejected"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (similar).

B. Federalism Canons Compel the Narrower Reading.

As with the Department's special-conditions theory, federalism principles foreclose its applicable-laws theory. First, "if Congress intends to impose a

condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) (Congress must "make the existence of the condition . . . explicitly obvious"). Second, as explained above, a statute cannot be read to intrude on core state functions unless the intrusion is "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (1991). These presumptions are key to maintaining the federal balance. *See Solid Waste*, 531 U.S. at 172-73.

Gregory and *Pennhurst* are fatal to the Department's position. In its brief, it avoids identifying the precise mechanism by which it thinks § 10153(a)(5)(D) supports the compliance condition—i.e. whether (a) the statute *delegates* authority for the Department to create new conditions by choosing laws to turn into spending conditions, or (b) the statute *itself* makes spending conditions out of all federal laws that apply to grantees. Neither mechanism is supported by a clear statutory statement.

The delegation possibility is a textual non-starter because § 10153(a)(5)(D) contains no language delegating authority to create new substantive grant conditions, unlike the dozens of statutes that delegate such authority explicitly. *See infra* Part III (listing statutes). At most, § 10153(a)(5) allows the Department to create a "form" for certifying compliance. *See* Black's Law Dictionary (10th ed. 2014)

(defining "form" as a "document" to be filled in, as "distinguished" from "substance"). That is a far cry from the "unmistakably clear" language required for Congress to "authorize administrative agencies to . . . encroach[] upon a traditional state power" like criminal justice. *Gregory*, 501 U.S. at 460; *Solid Waste*, 531 U.S. at 172-73.

Unable to claim any delegation of authority to create new conditions, the Department would have to establish that § 10153(a)(5)(D) *itself* creates JAG conditions out of every separate statute and regulation that applies to localities and their employees—and that applicants are agreeing to every one of those conditions when they sign the § 10153(a)(5)(D) certification. U.S. Br. 41. But § 10153(a)(5)(D) does not "unambiguously" tell JAG applicants that their grants are conditioned on their compliance with an unlimited swath of unidentified conditions scattered across the U.S. Code and Code of Federal Regulations. *Pennhurst*, 451 U.S. at 17. To the contrary, as explained above, the narrower understanding is far and away the better one. Thus, because § 10153(a)(5)(D) is not "explicitly obvious" in imposing the Department's conditions, they do not exist. *Mayweathers*, 314 F.3d at 1067; *see Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003).[14]

[14] In other cases, the Department has suggested that its reading satisfies the clear-statement rule of *Pennhurst* and *Mayweathers* because § 10153(a)(5)(D) unambiguously refers to *some* conditions for JAG funds. This contention misunderstands the nature of the clear-statement rule. While Congress does not need to "list every *factual* instance in which a state will fail to comply with a condition," it must "make the *existence* of the condition itself . . . explicitly obvious."

In addition to its conflict with these legal principles, the Department's applicable-laws theory would have troubling practical consequences. Far from an innocuous reinforcement of existing obligations, the Department is trying to use § 10153(a)(5)(D) to enforce dubious *new* interpretations of at least eight different immigration statutes. *See* JAG Solicitation, FY 2018, at 36-37, 44-45 (imposing aggressive interpretations of 8 U.S.C. §§ 1226(c), 1226(a), 1231(a)(4), 1324(a), 1357(a), 1366(1), 1366(3), 1373). This Court, like every other court to consider them, has rejected those interpretations. *United States v. California*, --- F.3d ---, 2019 WL 1717075, at *13-15, *17-19 (9th Cir. Apr. 18, 2019); *Steinle v. San Francisco*, 919 F.3d 1154, 1164 (9th Cir. 2019).[15] But by turning them into grant conditions, the Department can coerce compliance en masse, giving recipients mere weeks to either acquiesce or file emergency legal action raising a host of major constitutional and statutory issues—a high-stakes and expensive choice for localities that depend on federal funds. *See* U.S. Br. 50-55 (arguing that each locality should have to bring its own case); SF Br. 41. Grantees that want to protect their funds

Mayweathers, 314 F.3d at 1067 (emphases added). Section 10153(a)(5)(D) does not "obvious[ly]" impose the § 1373 compliance condition (whatever its factual applications) or the hundreds of other compliance conditions the Department's reading would entail. In fact, § 10153(a)(5)(D) does not unambiguously impose *any* new conditions, it simply requires applicants to certify that they will comply with existing grant requirements.

[15] *See also Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 331-33 (E.D. Pa. 2018); *San Francisco*, 349 F. Supp. 3d at 966-68.

would have to file cases year after year, as the Department finds new statutes to reinterpret as imposing the same rules—just as it did from 2017 to 2018. *Compare* JAG Solicitation, FY 2017, at 15, 20, App. 2 (imposing notice and access conditions as interpretations of § 1373); U.S. Br. 42-46, *with* JAG Solicitation, FY 2018, at 36-37 (imposing the same conditions as interpretations of § 1226, § 1231, and § 1357). Congress does not "casually" authorize federal agencies to intrude on state prerogatives so blatantly. *Solid Waste*, 531 U.S. at 172-73.

Accordingly, even if the text and context did not foreclose the Department's broad position, federalism principles would.[16] Section 10153(a)(5)(D) requires JAG applicants to certify they will comply with all the requirements that apply to their grant. It does not delegate unlimited power over local police or impose a limitless ream of new conditions.

III. No Other Statutory Provision Confers the Relevant Authority.

The Department's new conditions have been rejected by every single judge to review them, including two unanimous appellate courts and five district courts. Searching for some new argument, the Department now claims to locate authority

[16] The Department rightly does not ask for any deference under *Chevron, Inc. v. NRDC*, 467 U.S. 837 (1984). Its operative decision—the 2017 JAG solicitation—is merely an "informal document" that "offer[s] little more than uncited, conclusory assertions" that § 1373 counts as an "applicable" law. *Fox v. Clinton*, 684 F.3d 67, 78 (D.C. Cir. 2012) (no *Chevron* deference without more formal deliberation). Nor did the Department provide even a "minimal level of analysis" for its new interpretation of "applicable" in the JAG statute. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (withholding deference on this basis).

in a handful of other provisions. But these provisions pertain only to narrow, ministerial aspects of grant administration, and they look nothing like the clear language Congress uses when it confers authority to create new substantive conditions. The Department's last-ditch arguments are meritless.

First, the Department notes that § 10102(a)(6) allows the Assistant Attorney General to be delegated the power to set "priority purposes for formula grants." U.S. Br. 21, 24. But even if that power *had* been delegated to the AAG, *but see* SF Br. 19-22; Cal. Br. 30-32, it would simply allow the AAG to determine priorities for how JAG grants are used—not to impose separate requirements unrelated to how the funds are spent. None of the new conditions implicates this authority, because none of them directs how recipients spend their JAG grants.

Second, the Department invokes a provision of the JAG statute requiring applicants to certify that they will "report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require." 34 U.S.C. § 10153(a)(4); *see* U.S. Br. 20, 22, 24. But, like all the other JAG application requirements, this provision pertains to grant administration. *Cf. Kucana*, 558 U.S. at 246 (interpreting provision in line with adjacent provisions). It allows the Department to impose recordkeeping and reporting requirements, in order to account for how JAG funds are being spent. It does not give the Department an expansive power to make grantees participate in unrelated federal programs.

Third, the Department claims authority based on a provision requiring JAG applicants to certify that, prior to applying for funds, "there has been appropriate coordination with affected agencies." 34 U.S.C. § 10153(a)(5)(C); *see* U.S. Br. 20, 22-24. But this, too, simply requires applicants to certify that they have coordinated with state and local agencies that will be affected *by the grant*. *See* 34 U.S.C. 10251(a)(6) (defining "public agency" for JAG purposes as limited to state and local entities). And it uses the past tense—"has been"—foreclosing any suggestion that the provision requires grantees to sign up for *ongoing* enforcement collaboration with DHS. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) ("verb tense is significant in construing statutes").

The Third Circuit properly rejected all of the Department's newfound statutory arguments. As it explained, these provisions govern "the handling of federal funds and the programs to which those funds are directed." *Philadelphia*, 916 F.3d at 285. They do not allow the Department to impose requirements "unrelated to the use of grant funds." *Id.*

Indeed, none of these provisions remotely resembles the statutes that *do* provide agencies with open-ended authority to create new grant conditions. When Congress confers that kind of authority, it does so explicitly. *See e.g.*, 34 U.S.C. § 10446(e)(3) (authorizing the Department to "impose reasonable conditions on grant awards"); 34 U.S.C. § 40701(c)(1) (authorizing Department to "establish

appropriate grant conditions"); 15 U.S.C. § 2684(g); 16 U.S.C. § 1225; 20 U.S.C. § 1682; 25 U.S.C. § 1644(b); 25 U.S.C. § 1652(b); 29 U.S.C. § 794(a); 42 U.S.C. § 280e(e); 42 U.S.C. § 2000d-1; 47 U.S.C. § 1204(b)(2).

These explicit examples foreclose any suggestion that Congress would confer this authority so cryptically, in provisions that by their terms speak only to the use of grant funds. Congress "knows how" to confer broader authority "in express terms," it simply chose not to here. *Kimbrough v. United States*, 552 U.S. 85, 103 (2007). Nor would Congress place an unlimited conditioning power next to the JAG statute's narrow list of ministerial application requirements. *See Chicago v. Sessions*, 888 F.2d 272, 285 (7th Cir. 2018) (calling this an "odd place" to put such a power); *Whitman*, 531 U.S. at 468.

* * *

Congress has not authorized the Department to use JAG funds as leverage to coerce local police into helping arrest and deport their own residents. The Department's unprecedented statutory claims should be rejected.

CONCLUSION

The Court should affirm the decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 32-1(a) because it contains 6,895 words, exclusive of the portions of the brief that are exempted by Rule 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Spencer E. Amdur
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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2019, I electronically filed the foregoing Brief of Amici Curiae with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

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ADDENDUM: LIST OF AMICI CURIAE

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU, through its Immigrants' Rights Project and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens. In particular, the ACLU has a longstanding interest in enforcing the constitutional and statutory constraints on the federal government's use of state and local police to enforce civil immigration laws. The ACLU has been counsel and amicus in a variety of cases involving these issues, including *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015); *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *United States v. California*, --- F.3d ---, 2019 WL 1717075 (9th Cir. Apr. 18, 2019); *City of Philadelphia v. Attorney General of the United States*, 916 F.3d 276 (3d Cir. 2019); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2017); and *Gonzalez v. ICE*, No. 13-cv-4416 (C.D. Cal.).

The **National Immigrant Justice Center (NIJC)** is a program of Heartland Alliance, which provides resettlement services to refugees and mental health services for immigrants and refugees. NIJC, through its staff of attorneys, paralegals, and a network of over 1,500 *pro bono* attorneys, provides free or low-cost legal services to immigrants, including detained non-citizens. NIJC's direct

representation, as well as its immigration advisals to criminal defense attorneys, has informed its strategic policy and litigation work around the myriad legal and policy problems of entangling local law enforcement in civil immigration enforcement. NIJC is counsel on a host of immigration detainer-related cases including *Jimenez Moreno v. Napolitano*, 11-5452 (N.D. Ill.) and *Makowski v. United States*, 12-5265 (N.D. Ill.). NIJC also advocated for the amendments to Chicago's Welcoming City Ordinance (Ch. 2-173) in 2012, the Cook County detainer ordinance (11-O-73) in 2011, and the recently-enacted Illinois TRUST Act (S.B. 31).

The **National Immigration Law Center (NILC)** is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce the values of equality, opportunity, and justice. NILC has earned a national leadership reputation for its expertise in the rights of immigrants, including litigating key due process cases to protect the rights of noncitizens.

The **Washington Defender Association (WDA)** is a statewide non-profit organization whose membership includes public defender agencies and those working to improve the quality of indigent defense in Washington State. WDA provides support for high quality legal representation by advocating for change,

educating defenders, and collaborating with the community and justice system stakeholders to defend and advance the rights of noncitizens engaged with the criminal justice system. In 2018, WDA lead a coalition that successfully advocated for the King County Council to pass an ordinance prohibiting county agencies, including law enforcement, from collaborating in ICE enforcement.

The **Southern Poverty Law Center (SPLC)** is a non-profit organization founded in 1971 that throughout its history has worked to make the nation's constitutional ideals a reality for everyone. The Immigrant Justice Project of the SPLC provides high-quality legal representation to detained immigrants five immigration detention facilities in the South. It also brings systemic litigation to challenge unjust systems that push people into the deportation system and keep them locked up. Although the Center's work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law.

The **Northwest Immigrant Rights Project (NWIRP)** is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants who are applying for immigration and naturalization benefits and to persons who are placed in removal proceedings. In addition, NWIRP engages in community education to immigrant communities who interact both with federal

immigration enforcement and local law enforcement agencies. Thus, NWIRP has a direct interest in the issues presented in this case.

The **New Orleans Workers' Center for Racial Justice** is membership organization founded by guest workers, immigrant workers, and Black residents of New Orleans in the aftermath of Hurricane Katrina. The Center is dedicated to defending civil and labor rights through organizing, advocacy, and litigation. The Center's members organized for and won welcoming city policies in New Orleans that make the city safer for all residents, both immigrant and U.S born. In 2011, two reconstruction workers represented by the Center brought suit against the Sheriff of Orleans Parish for unlawfully over-detaining immigrants—for as long as five months, without any probable cause determination. *Cacho v. Gusman*, Civ. No. 11-225 (E.D. La.). In 2013, the Sheriff agreed to stop both the unconstitutional over-detention of immigrants and the use of jail resources for civil immigration investigations, announcing a new policy that was part of the settlement of the *Cacho* case.